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Administrative Law - The Freedom of Information Act and Equitable Discretion - 5 U.S.C. 552 (1970)

Phyllis I. Crist

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NOTE

ADMINISTRATIVE LAW—THE FREEDOM OF INFORMATION ACT AND EQUITABLE DISCRETION
5 U.S.C. § 552 (1970)

INTRODUCTION

The Freedom of Information Act (FOIA)[1] provides for judicial review of an agency's refusal to produce information. Section 552(a)(3)[2] of that Act grants federal district courts jurisdiction to order agencies to disclose improperly withheld records. The FOIA was intended by Congress to give any person access to governmental records, unless the material sought falls within one of nine expressly enumerated exemptions.[3] In general, the Act places the burden on the agency to justify nondisclosure.[4]

This Act replaced section 3 of the Administrative Procedure Act (APA),[5] which had granted administrative agencies discretion in determining whether to release information, with little or no opportunity for judicial review of the agency's action. Under

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[1]5 U.S.C. § 552 (1970).

[2]The pertinent text of the statute is set forth in section I, *infra*.

[3]Exempted are:

> (b) [M]atters that are . . . .
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> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
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> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
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> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
>
> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
>
> (9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b) (1970). *See also* Annot., 7 A.L.R. FED. 870 (1970).

[4]5 U.S.C. § 552(a)(3) (1970).

[5]Act of June 11, 1946, ch. 324, § 3, 60 Stat. 237.

the prior provisions, if agency officials determined that the information sought could be withheld for any of a number of reasons,[6] the party seeking the information had no remedy available unless an action was pending before a court so that pretrial discovery under the Federal Rules of Civil Procedure would be available.[7] Both the House and Senate condemned the results under the prior Act, which through its broad language generally allowed the withholding of information.[8] The changes made by the FOIA were fundamental, creating a true disclosure act and eliminating the vague standards embodied in the APA.

The emphasis in the FOIA on required disclosure, however, has led to the further question of whether courts should exercise equitable discretion in applying the Act, beyond determining if any of the nine specified exemptions apply. An increasing divergence of viewpoint within and between jurisdictions that have considered this issue has become apparent since the exercise of such discretion was first upheld in *Consumers Union, Inc. v. Veterans Administration*.[9] One view is that the Act allows courts to exercise equitable discretion; the opposite is that in applying the Act, courts should limit themselves to ascertaining whether any specific exemption applies, and, if not, disclosure should be ordered. The recent case of *Hawkes v. IRS*[10] typifies the ongoing debate regarding equitable discretion under the Act. *Hawkes* also provides a vantage point for possible reconciliation of the conflict that has emerged from this debate.

To understand these recent developments and their implications, this note will analyze the Act's language and its legislative history to determine whether Congress intended that Act to abro-

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[6]The prior Act allowed agencies to withhold records for such reasons as secrecy required "in the public interest;" the agency officials determined that the records sought related to the internal management of the agency; or there was "good cause found" to withhold the records. *Id.*; Annot., *supra* note 3, at 884.

[7]Act of June 11, 1946, ch. 324, § 3, 60 Stat. 237; Annot., *supra* note 3, at 884-85.

[8]H.R. REP. No. 1497, 89th Cong., 2d Sess. 2 (1966); S. REP. No. 813, 89th Cong., 1st Sess. 5 (1965); *see* Annot., *supra* note 3, at 879; Note, *Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration*, 45 IND. L.J. 421 (1970); Note, *Administrative Law—The Freedom of Information Act—The Use of Equitable Discretion to Modify the Act*, 44 TUL. L. REV. 800 (1970).

[9]301 F. Supp. 796 (S.D.N.Y. 1969), *dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). For discussions of this issue in light of *Consumers Union*, *see* Note, *Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration*, *supra* note 8, at 424; Note, *Administrative Law—The Freedom of Information Act—The Use of Equitable Discretion to Modify the Act*, *supra* note 8, at 805.

[10]467 F.2d 787 (6th Cir. 1972).

gate courts' equitable remedies, discuss the *Consumers Union* and *Hawkes* cases concerning the use of traditional equitable principles to withhold disclosure which would otherwise be available under the Act, and propose reconciliation through coexistence of the two seemingly conflicting viewpoints enumerated above.

I. FOIA: Its Language and Legislative History

The language of the FOIA appears to convey a clear Congressional intent to make the Act the exclusive authority for withholding information. The pertinent sections of the Act provide:

> (3) [E]ach agency, on request for identifiable records made in accordance with published rules . . . shall make the records promptly available to *any person.* On complaint, the district court of the United States in the district in which the complainant resides, . . . has jurisdiction *to enjoin* the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court *shall determine the matter de novo* and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee . . . .
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> . . . .
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> (c) This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section.* This section is not authority to withhold information from Congress.[11]

In spite of this strong language, it is not clear from the legislative history of the Act that Congress intended to exclude judicial use of equitable discretion in the application of the FOIA. The intention of the Senate in enacting the FOIA was to close the loopholes of section 3 of the APA, which it superseded, thereby creating a disclosure act to replace what had become a withholding act.[12] The FOIA was to make available "to any person" all information disclosable under its terms, and to allow exemptions based only on the nature of the material sought, not on the identity or status of the seeker.[13] However, the authority of the Senate's interpretation of the Act, approved by the House and Senate when the Act was passed, is weakened through contradiction by the interpretation given the Act by the House Committee on

[11] 5 U.S.C. § 552(a)(3), (c) (1970) (emphasis added).
[12] S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965).
[13] *Id.*

Government Operations, which reported favorably *without amendment* on the Senate bill to amend section 3 of the APA. The House interpretation of the language in subsection 552(a)(3) was that the proceedings were to be de novo "so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion."[14] The grant of authority to the district courts was, in the view of the House, to enjoin an agency from withholding information "whenever [the court] considers such action equitable and appropriate."[15] Thus, either viewpoint of the Act—that it does or does not allow equitable discretion in its application by the courts—gives effect to what was arguably the legislative intent, based on both the language and the legislative history of the Act.

It has been suggested that an amendment is necessary to clarify Congressional intent with respect to equitable discretion. During the 1972 Hearings before a Subcommittee of the House Committee on Government Operations, one witness[16] stated:

> Those of us who participated, in the 1960's, in the drafting and passage of the act never dreamed that our glaring imperfections would be reviewed and, hopefully, corrected at such an early stage. We knew that we had achieved only a small beginning, and that we had compromised away much for the sake of passage of the act.
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> . . . .
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> The major deficiencies in the act as codified, in my view, are contained in section 552(a)(3) and (4).
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> . . . .
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> . . . [T]he phrase "shall make the records promptly available to any person" is still causing troubles. Judges continue to inquire into a person's "need to know." It was not the intent of the drafters of the Freedom of Information Act that a person should have to have any particular or stated reason for wishing to see Government records, nor that motivation should be a matter for the courts.
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> . . . [J]udges have decided for themselves that it is discretion-

[14]H.R. REP. NO. 1497, 89th CONG., 2d Sess. 9 (1966).

[15]*Id.*

[16]The witness was Bernard Fensterwald, Jr., an attorney, described as one of the "experienced frontline soldiers in the fight for the public's 'right to know' [who has] brought and is presently engaged in litigation which has substantially opened the doors on our Government's activities," by Representative William S. Moorhead, Chairman of the Foreign Operations and Government Information Subcommittee of the Committee on Government Operations. *Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pt. 5, at 1375-76 (1972).

> ary with them whether they order the production of nonexempt material. In effect, they are applying theories of equity. This, again, was not the intention of the drafters. Hence the phrase "has jurisdiction to enjoin" should be changed to read "shall enjoin."[17]

This proposed change, however, would be unlikely to effectuate clearly the intent of Congress to remove equitable discretion from courts, as there is precedent that even the words "shall enjoin" are not necessarily sufficient to preclude courts from exercising their inherent equity powers.[18] In commenting on the Supreme Court's position in *Hecht Co. v. Bowles,*[19] Professor Davis stated:

> Even though the Emergency Price Control Act of 1942 provided that an injunction "shall be granted" against a violation, the Supreme Court held "we do not think that under all circumstances the court must issue the injunction or other order which the Administrator seeks." The Court emphasized the fundamental character of equity jurisdiction: "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." The Court accordingly upheld a refusal to enjoin violations resting on "mistakes . . . made in good faith . . . ."
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> When the Supreme Court so holds even under a statutory provision that an injunction "shall be granted," surely equitable traditions apply under the Information Act's provision that the court "shall have jurisdiction . . . ."[20]

The Supreme Court recognizes its jurisdiction to exercise equitable discretion in appropriate cases, and by analogy to the *Hecht* case, the Supreme Court would not restrict courts to application of the Act's exemptions where the equities involved called for additional considerations. If Congress is to limit the equity powers of a court, then, it must do so expressly, and the words "shall enjoin" are probably not sufficient to convey decisively that under all circumstances Congress intends that courts apply only statutory rules, and not equitable principles.[21]

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[17] *Id.* at 1377-78.

[18] Hecht Co. v. Bowles, 321 U.S. 321, 328 (1944).

[19] *Id.*

[20] Davis, *The Information Act: A Preliminary Analysis,* 34 U. CHI. L. REV. 761, 767 (1967). *But see* United Steelworkers v. United States, 361 U.S. 39 (1959), wherein the Supreme Court held that the court *must* issue an injunction when the statutory requirements of the Labor-Management Relations Act were met.

[21] It should be noted, however, that the fact that Congress would *change* the FOIA to say "shall enjoin," after extensive hearings showing that this would deprive courts of

II. FOIA CASES AND THE USE OF EQUITABLE PRINCIPLES

A. Consumers Union, Inc. v. Veterans Administration

If words as strong as "shall enjoin" are insufficient under present rules of statutory construction to remove equitable discretion from the courts, it is hardly surprising that, under the current wording of the Act, numerous cases exist upholding equitable discretion to refuse enforcement in FOIA cases even when the material sought does not come within a specific exemption.[22] In the first case upholding such discretion, *Consumers Union, Inc. v. Veterans Administration,*[23] Consumers Union sought release of Veterans Administration (VA) test results and evaluations that had served as the basis of a qualified products list from which VA doctors prescribed hearing aids. The court concluded that although none of the exemptions from disclosure in subsection 552(b) applied, it was not automatically bound under the Act to order disclosure. The *Consumers Union* court held that, if records are not exempted from disclosure under that Act, the court must order disclosure unless the agency proves that greater harm than good would result; moreover, the court emphasized that it is the effect on the public rather than on the person seeking information that must be weighed.[24]

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equity jurisdiction, might in itself make a stronger case for courts to abstain from exercising their discretion. Generally, however, where principles and rules of equity are extended or abridged by statute, the statute is given a strict construction, *i.e.*, courts will normally construe the statute so as to preserve their equitable powers. Dennis v. Prather, 212 Ala. 449, 103 So. 59 (1925); Ethridge v. Pitts, 152 Ga. 1, 108 S.E. 543 (1921); Jay-Bee Realty Corp. v. Agricultural Ins. Co., 330 Ill. App. 310, 50 N.E.2d 973 (1943); Brown v. Chicago & N.W. Ry., 82 N.W. 1003 (Iowa 1900). It has also been said that a court of equity may not be divested of its jurisdiction by implication. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960). When Congress extends to an equity court power to enforce statutory enactments, "it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes." *Id.* at 292.

[22]Cases holding or implying that courts do have equitable discretion to decide whether to order disclosure of documents not exempt from the Act include Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972); General Servs. Admin. v. Benson, 415 F.2d 878 (9th Cir. 1969); Long v. IRS, 349 F. Supp. 871 (W.D. Wash. 1972); Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D. N.Y. 1969), *dismissed as moot,* 436 F.2d 1363 (2d Cir. 1971). Cases with implications that such discretion does *not* exist include Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973); Hawkes v. IRS, 467 F.2d 787, 792 n.6 (6th Cir. 1972); Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 661-62 (6th Cir. 1972); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Soucie v. David, 448 F.2d 1067, 1076 (D.C. Cir. 1971) (dictum); Wellford v. Hardin, 444 F.2d 21, 24 (4th Cir. 1971); Stokes v. Hodgson, 347 F. Supp. 1371, 1377 (N.D. Ga. 1972); Sears, Roebuck & Co. v. NLRB, 346 F. Supp. 751 (D.D.C. 1972).

[23]301 F. Supp. 796 (S.D.N.Y. 1969), *dismissed as moot,* 436 F.2d 1363 (2d Cir. 1971).

[24]*Id. See* Annot., *supra* note 3, at 891; Wiel, *Administrative Finality,* 38 HARV. L. REV. 447, 462 (1925) (discussion of effects of administrative action on the public); Davis, *supra* note 20.

The *Consumers Union* court expressly adopted the general rule that statutes are not to be construed so as to divest by implication a court of equity of its jurisdiction.[25] The court looked to the language of subsection 552(a)(3) granting district courts "jurisdiction to enjoin,"[26] which sounds in equity, as a basis for its reasoning that courts can and should apply their full equity powers in FOIA cases.

The mandate in subsection 552(a)(3) that "the court shall determine the matter de novo"[27] has also been used as a basis for arguing that the general scope of judicial review in considering an order to disclose particular records should not be limited merely to determining the technical applicability of the nine exemptions.

> The injunction is an equitable remedy. In a trial de novo under subsection (c) the district court is free to exercise the traditional discretion of a court of equity in determining whether or not the relief sought by the plaintiff should be granted.[28]

Under this argument, subsection 552(a)(3) is interpreted as implicitly providing for the use of equitable discretion, and therefore the restriction of subsection 552(c) does not prevent courts from exercising such discretion.

B. Hawkes v. IRS

Equally forceful arguments have been made by courts refusing to apply equitable discretion when none of the FOIA exemptions authorize withholding information. The majority opinion in *Hawkes v. IRS*[29] typifies the latter approach. In *Hawkes*, the plaintiff had been indicted for tax fraud, and to prepare his defense sought information and documents held by the IRS, some through regular discovery proceedings and some extrajudicially. The IRS declined to release some of the requested information, including portions of an IRS manual which had not been requested through the discovery proceedings. Hawkes then sought in a separate action under the FOIA an order requiring disclosure of all requested materials. The IRS successfully moved for dis-

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[25]See the discussion of general principles concerning statutory enactments and equity discretion, *supra* note 21.

[26]5 U.S.C. § 552 (1970).

[27]*Id.*

[28]ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE APA 27, 29 (1967). Subsection (c) provides that the Act does not authorize withholding information except as specifically provided. 5 U.S.C. § 552(c) (1970); *see* text accompanying note 11 *supra*.

[29]467 F.2d 787 (6th Cir. 1972).

missal, arguing that disclosure under the FOIA was an equitable remedy which should not be granted when there was an adequate remedy at law available, here discovery proceedings. The IRS also argued that the material sought was specifically exempted from the FOIA under subsection 552(b)(2).[30] The district court ruled in favor of the IRS, and, while his civil appeal was pending, Hawkes entered a plea of nolo contendere to the fraud case and was sentenced to prison.[31]

Although the Sixth Circuit was able to dispose of Hawkes' civil appeal on an unrelated issue,[32] the court felt the matter of equitable discretion was of sufficient importance to merit comment, even though the court specifically declined to set a binding precedent pending a "live controversy."[33]

The majority in *Hawkes* looked to the intent of the legislature as their basis for rejecting the IRS' argument that a district court, in applying the FOIA, is bound by rules traditionally governing equity courts, and in particular the principle that equitable relief is not to be granted where an adequate remedy at law exists. The *Hawkes* majority reasoned that not only may Congress cut back on both discretionary power and on restrictions of equity jurisdiction when it grants courts injunctive power to enforce federal policy, but that Congress actually intended to do so under the Act. Therefore, they reasoned, Congress did not intend to require exhaustion of the criminal discovery process as a prerequisite to disclosure under the FOIA. The court held that in accordance with Congressional intent the FOIA denies the court power to refuse disclosure of materials covered by the Act for any reason other than those exceptions listed in subsection 552(b).[34] The majority pointed out that protection for documents to be disclosed only through the discovery process is afforded by subsections 552(b)(7) and (b)(3) of the Act, and that whatever conflicts might arise between criminal discovery procedure and civil disclosure suit under the Act would be minimal in nature and could be handled by the judicial process.[35]

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[30]5 U.S.C. § 552(b)(2) (1970).

[31]467 F.2d at 790 n.3.

[32]The lower court had failed to consider the propriety of withholding all the requested information. Its ruling, and the IRS' arguments for dismissal, focused solely upon the IRS manual. *Id.* at 790-91.

[33]*Id.* at 792-93 n.6.

[34]This is also the position of the Ninth and District of Columbia Circuits. Note, *Developments Under the Freedom of Information Act—1972*, 1973 DUKE L.J. 178 n.9.

[35]467 F.2d at 792-93 n.6.

The court viewed the legislative history of section 3 of the APA and of the Information Act as expressing an intent to allow exemptions based "on the nature of the material sought—not the identity or status of the seeker."[36] Therefore application of the principle that equitable relief would not be granted where an adequate remedy at law exists would thwart the Act's purpose since it would require a court to look at the seeker's situation and reasons for requesting the information in order to determine if he might obtain the requested information through any other legal means prior to allowing him to invoke the injunctive remedy provided by the Act. In sum, the majority in *Hawkes* found that in giving effect to Congressional intent the court, under the Act, does not possess its full equitable powers.

C. *Judge Miller's Separate Opinion in* Hawkes

Judge Miller in his separate opinion, concurring in part and dissenting in part, did not agree that the power of a court sitting in equity is necessarily restricted by the FOIA, and especially objected to the majority's discussion of the equitable discretion question prior to its presentation in a live controversy.[37] He stated that "a strong argument can be made that courts do possess equitable powers under the Act."[38] It was his opinion that it was unnecessary to decide whether a court may apply equitable principles under the Act, but since the majority saw fit to speak out on the issue he resisted their contention that the FOIA generally restricts discretionary jurisdiction and the powers of a court sitting in equity.

The majority and Judge Miller start from contrary premises: The majority, that application of the FOIA is governed by the legislative intent which precludes a court from exercising its traditional equitable jurisdiction; Judge Miller, that the court retains equity powers when applying the Act, since neither its language nor its history expressly provides otherwise.

III. Resolution

By juxtaposing and analyzing the seemingly conflicting viewpoints of the *Consumers Union* court and the *Hawkes* court, a basis for resolution can be found. An analysis of Judge Miller's

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[36] *Id.* *See also id.* at 790 n.3.

[37] *Id.* at 797.

[38] *Id.* Judge Miller was quoting his concurring opinion in Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657 (6th Cir. 1972).

separate opinion in the *Hawkes* case is a helpful catalyst to this process.

Judge Miller's remarks, while stating the general rule that the court cannot be deprived of its equitable powers by mere statutory enactment, appear to recognize some limitation on these powers. Judge Miller qualifies his objections by saying that it is "unnecessary to decide whether a court may not *in some situations* under the Freedom of Information Act apply general equitable principles."[39] His is not a categorical rejection of any encroachment whatsoever on the court's equity powers, but a rejection of *general* abdication of such powers. Even though Judge Miller does not accept the majority's view that the Act's legislative history controls its application such that the court becomes bound to implement the Act *in place of* exercising its own equitable powers, he appears to concur in all other aspects of the majority opinion. And in so doing Judge Miller impliedly accepts the Act as preempting the court's discretion at least to the extent that equitable principles do not become applicable unless the court first determines that none of the nine exemptions apply. This reasoning necessarily implies that the Act requires court review of an agency's action in withholding information, and possible application of any of the Act's statutory exemptions, prior to applying general equitable principles and imposing a nonstatutory remedy. Such a modified approach would not preclude the trying of a suit altogether, as would, for example, the principle that where an adequate remedy at law exists equitable relief is not available.[40] The necessity of following this sequence creates a condition precedent to the exercise of a court's traditional equitable discretion, thereby placing some limit on its equity jurisdiction.

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[39]467 F.2d at 797 (emphasis added).

[40]Concerning available remedies for withholding disclosable information, it is interesting to note the contradiction between the Department of Justice's endorsement of a court's inherent equitable powers in administering the Act and the statement of Mr. Robert Ackerly, another attorney engaged in litigation under the FOIA, who was called to testify before the 1972 House Subcommittee on Government Operations. Discussing the possibility of speeding up agency action by asking the court to enjoin renegotiation proceedings until the agency complies with the Act, he stated: "The Department of Justice denies that the court has any jurisdiction whatsoever to enter an injunction outside the injunction mentioned in the Act." Hearings, *supra* note 16, at 1401. Accepting Mr. Ackerly's statement as accurate, the position of the Justice Department, that a court has inherent power to exercise equitable discretion, but that this does not extend to shaping equitable remedies, is untenable.

On the other hand, the view of the majority in *Hawkes,* and of the other circuits holding the same way, appears to leave itself open for the exercise of equitable discretion if the need should arise. It is significant that the *Hawkes* majority declined to hold as a rule of law that in general the Act precludes exercise of a court's equity powers. Similarly, *Soucie v. David,*[41] often cited for holding that the Act precludes a court's equity powers, also leaves itself leeway for applying equity rules in extreme circumstances.[42] These cases which uphold the Act's displacement of the court's equity jurisdiction, seem to imply that in extreme circumstances, if none of the Act's exemptions apply so as to withhold disclosure, the court retains such equitable powers as are necessary to do justice outside the Act's language.

A basis for resolution of these seemingly antagonistic points of departure exists in the recognition that, although certain of a court's traditional powers have been limited and that certain equitable principles have been made inapplicable under the Act,[43] situations may arise which could lead the court to apply equitable principles.[44] The resolution of the equitable discretion question, then, would not necessarily involve a substantial shift from present policy and practice, but would lie in the courts' incorporation of both of the positions that have been developing. This compromise, if adopted by the courts, would make for an adaptable, flexible, and realistic application of the FOIA.

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[41]448 F.2d 1067 (D.C. Cir. 1971).

[42]The *Soucie* court stated:

> Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself. There may be exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion, but no such circumstance appears in the present record of this case.

Id. at 1077 (footnote omitted).

[43]*E.g.*, the principle that equity is not available where an adequate remedy at law exists should not be applied under the Information Act since this would focus on the seeker rather than the material sought. It is true that this principle was also rejected in *Hawkes* because of the change of circumstance such that substantial justice would have been denied had the court applied it. But the majority intimated that the district court was not justified in apparently accepting the IRS' argument that this principle applied.

Also, certain equitable principles which would bar an action altogether are made inapplicable because the court must first apply the Act to find if any exemptions apply before considering any equitable principles.

[44]*See* text accompanying notes 19-20 *supra.*

Incorporation of both views, however, would necessarily impose equity jurisdiction (at least in extreme circumstances, with the definition and application of what is "extreme" left up to the courts) on courts such as the *Hawkes* majority which do not want equity jurisdiction under the Act. Moreover, such a two-step resolution, in which the Act is first construed to find out if any exemption applies, and then if none applies the courts are allowed to invoke equity jurisdiction, could result in a one-sided construction in favor of nondisclosure, in effect giving the government two chances in which to defy what appears on the Act's face to be a clear mandate to disclose. Such a result flies in the face of the Act's purpose, and yet appears justified somewhat by the ambivalence inherent in its language and history.

CONCLUSION

Realistically, however, the circuit courts appear unlikely to resolve the equitable discretion question on their own, since five circuits have already reached conflicting positions on the issue. The Fifth and Ninth Circuits have upheld courts' equitable discretion in applying the FOIA, and the Fourth, Sixth, and District of Columbia Circuits have decided that courts do not have such discretion under the Act.[45] Although the Supreme Court could decide this issue, it has not yet done so. Therefore, the solution to the equitable discretion question will more likely be forthcoming, if at all, from Congress.

Phyllis I. Crist

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[45]Note, *supra* note 34.